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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. KYLE CURTIS ASH, Defendant and Appellant.	C080511 (Super. Ct. No. CM040981)

A jury found defendant Kyle Curtis Ash guilty of battery causing serious bodily injury, assault, and battery following an altercation with an employee at a bar. On appeal, defendant contends the trial court erred when it instructed the jury that a person does not have a right to self-defense when he or she provokes a fight with intent to create an excuse to use force. Defendant also contends his convictions for simple assault and simple battery must be reversed because those crimes are lesser included offenses of battery causing serious bodily injury. We disagree the trial court committed instructional error, but we agree defendant's convictions for simple assault and simple battery must be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

Defendant was at a bar in Chico. At this bar hung a bell which, when rung, required the bell-ringer to buy a drink for each woman in the bar. If the bell-ringer refused to comply with the rule, he or she was required to leave the bar. Defendant rang the bell, but he did not believe he would have to comply with the rule. Edward C. (Edward), the door manager at the bar, informed defendant of his obligation. Defendant refused to buy the drinks, and he refused Edward's subsequent order to leave the bar. Edward testified he informed defendant he would be trespassing if he remained in the bar, and defendant responded, "Well, I'm no punk. You're not going to be able to get me out of this bar." Edward informed defendant he was now trespassing and asked him repeatedly to leave the bar. Edward then told defendant he or the police would physically remove defendant from the bar. Defendant said, "You're not going to put hands on me," and he stood up aggressively from his bar stool and turned toward Edward.

Defendant claimed he attempted to negotiate with Edward when asked to pay for the drinks. But Edward told defendant, "This isn't how this works. If you don't give me the $170 [for the drinks], I'm going to take you outside and fuck you up." Defendant felt threatened and extorted.

Edward restrained defendant with a bear hug and walked him toward an exit. Defendant broke free of Edward's grasp, causing them to fall. Both men regained their footing, and defendant assumed a fighting stance. Edward then pushed defendant out the door, and defendant said, "I'm not trying to fight you. I'll leave." Edward then turned away from defendant. When Edward looked back at defendant moments later, defendant punched him in the jaw and broke it.

Police arrived and arrested defendant. A police officer testified defendant was hostile, verbally uncooperative, and under the influence of alcohol.

Charges, Jury Instructions, and Verdict

The prosecution charged defendant with battery causing serious bodily injury (Pen. Code, § 243, subd. (d))[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). The prosecution alleged an enhancement to the assault count that defendant personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

At trial, defendant argued he acted in self-defense, and the trial court instructed the jury on law relevant to defendant's self-defense claim. One of those instructions, CALCRIM No. 3472, entitled "Right to Self-Defense: May Not Be Contrived," provided: "A person does not have a right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Defendant did not object to that instruction.

The jury found defendant guilty of battery causing serious bodily injury. With respect to the assault charge, the jury found defendant guilty of the lesser included offenses simple battery (§ 242) and simple assault (§ 240).

The trial court suspended imposition of sentence and placed defendant on probation for three years. Defendant timely appealed.

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[1] Undesignated statutory references are to the Penal Code.

DISCUSSION

1.0 The Pattern Instruction on Contrived Self-Defense was Both Correct and Warranted

Defendant contends the evidence was insufficient to support instructing the jury on contrived self-defense. He argues, "The record shows [Edward] sparked his confrontation with [defendant] by placing him in a bear hug and/or by choking him. . . . There was no evidence that [defendant] sought a quarrel with [Edward] intending to create the necessity of exercising self-defense."[2] We disagree.

"A party is entitled to a requested instruction if it is supported by substantial evidence." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1049.) Evidence is substantial for this purpose if it is "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.) We apply the de novo standard of review to defendant's claim. (See *People v. Quiroz* (2013) 215 Cal.App.4th 65, 76 [stating appellate court reviews de novo trial court's assessment of whether there is substantial evidence warranting the giving of a jury instruction].)

Here, substantial evidence supports instructing the jury on contrived self-defense. Edward testified defendant refused his request to either pay for the drinks or leave the bar, stating, "Well, I'm no punk. You're not going to be able to get me out of this bar." When Edward warned defendant he was trespassing and would be physically removed from the bar if he refused to leave, defendant stated, "You're not going to put hands on me," before standing up aggressively and turning towards Edward. A reasonable jury

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[2] Defendant did not object to this instruction in the trial court, but under section 1259 we may review alleged instructional error if the substantial rights of a defendant were affected. Further, here defendant makes the alternative claim of ineffective assistance of counsel; thus, we reach the merits of defendant's claim of instructional error.

could have found defendant's uncooperative, aggressive, and combative demeanor toward a bar employee was intended to provoke a physical response from Edward, which would then justify defendant's use of self-defense. Indeed, Edward told defendant repeatedly that his continued noncompliance with Edward's request that he leave the bar would result in a physical response, either from Edward or the police. Nevertheless, defendant remained defiant and refused to leave the bar. At that point, Edward had little choice but to physically restrain defendant. The contrived self-defense instruction is supported by substantial evidence, and the trial court did not err in instructing the jury.

2.0 The Assault and Battery Convictions Are Lesser Included Offenses of Battery with Serious Injury and Must Be Reversed

Defendant contends he could not be convicted of battery causing serious bodily injury (§ 243, subd. (d)) and its necessarily included offenses of simple assault (§ 240) and simple battery (§ 242) all arising out of the same act: punching Edward in the jaw. The People properly concede the issue.

A person may not be convicted of a greater offense and a necessarily included offense based on the same conduct. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) When a defendant is so convicted, the lesser included offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) Because simple assault is an inchoate battery, assault is a necessarily included offense within the offense of battery. (*People v. Wright* (2002) 100 Cal.App.4th 703, 721.) Similarly, simple battery is a necessarily included offense within the offense of battery with serious injury. (See *People v. Benally* (1989) 208 Cal.App.3d 900, 912.) Because simple assault and simple battery are both necessarily includes offenses of battery with serious injury, defendant's convictions for simple assault and simple battery must be reversed.

DISPOSITION

Defendant's convictions for simple assault and simple battery are reversed. The judgment is otherwise affirmed.

s/BUTZ, J.

We concur:

s/RAYE, P. J.

s/BLEASE, J.